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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

MARKET-DOMINANT PRICE CHANGE	Docket No. R2021-2

COMMENTS OF THE
NATIONAL POSTAL POLICY COUNCIL
(June 28, 2021)

The National Postal Policy Council ("NPPC")[1] hereby respectfully submits these comments on the Postal Service's notice of market-dominant price adjustments.[2] The Commission should reject the proposed new rates.

NPPC believes that the noticed rate increases are unlawful insofar as they are based on so-called density and retirement rate authorities, which directly violate the statutory price cap, and which NPPC believes that the Commission lacked legal authority to adopt and lacks legal authority to approve rates based upon them.[3] Even if those authorities ultimately are held to be lawful, the noticed

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1 The National Postal Policy Council is an association of large business users of letter mail, primarily First-Class Mail using the Automation rate category, with member companies from the telecommunications, banking and financial services, insurance, and mail services industries. NPPC members account for a large majority of the Presort Letters and Card (hereinafter "Presort Mail") in the postal system and work closely with the Postal Service on worksharing and many other efforts to make their mail as efficient and low cost as possible.

2 *United States Postal Service Notice of Market-Dominant Price Change*, Docket No. R2021-1 (May 28, 2021) ("*USPS Notice*"). The Commission issued public notice in Order No. 5905. *Notice and Order on Price Adjustments and Classification Changes for Market Dominant Products*, Docket No. R2021-2 (June 1, 2021), 86 *Fed. Reg.* 30071 (June 4, 2021).

3 The legality of the portions of the rate increases in the *Notice* based on the so-called density and retirement authorities is currently subject to appellate review in *National Postal Policy Council v. Postal Regulatory Commission*, (D.C. Cir. Case No. 17-1276 Commission Brief filed

rates nonetheless appear illegal due to their timing. Furthermore, the Postal Service has failed to comply with the statute and relevant Commission regulations.

Finally, the new rates are not in the best interests of either mailers or the Postal Service. And the proposed workshare discount passthroughs for First-Class Presort Mail, while somewhat improved from previous levels and minimally compliant with rule 3030.280, show the need for a stronger regulation to ensure efficient workshare pricing.

I. THE CPI COMPONENTS OF THE RATES APPEAR TO VIOLATE SECTION 3622 ANNUAL LIMITATION AND MUST BE REJECTED

The rate increases proposed in the *Notice* raise a question of first impression under the PAEA. Added to the January 2021 rate increases, the additional increases in this docket exceed the annual CPI limit established by law. Accordingly, NPPC submits that the portion of the rate adjustments based on the CPI must be rejected as in violation of the annual limitation on increases established by 39 U.S.C. §3622(d)(1)(A).

Section 3622(d)(1)(A) provides that the system shall contain:

> *an annual limitation* on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation *over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates*.

June 14, 2021). If the Court rules that the Commission acted illegally in authorizing those authorities, the rate increases based on those authorities must be rescinded, 39 U.S.C. §3622(a)(emphasis added). The rate increases proposed by the Postal Service in this proceeding violate the plain words of the statute. That is because the CPI portion of the increases proposed in this docket, which average 1.244 percent, when added to the 1.831 percent increase that took effect in January 2021 (as a result of Docket No. R2021-1) results in a total increase of 3.075 percent. The cumulative increase of 3.075 percent (in January and August 2021) would nearly double CPI for the most recent 12-month period preceding the May 28 filing of the *Notice* (which ran from May 2020 to April 2021), which was approximately 1.55 percent. Accordingly, the CPI increases proposed in the *Notice* appear illegal.

It is immaterial to the 12-month annual limitation that the R2021-1 and R2021-2 rate increases were based on CPI calculations that were correctly made in those cases. What is relevant under the plain language of the "annual limitation" provision of Section 3622(a) is the 12-month period preceding the filing of the *Notice* in *this* proceeding—the period May 2020 through April 2021—in which CPI was only 1.55 percent. The Postal Service's *Notice* proposes to raise rates twice within 8 months based on 19 months of CPI rate authority, but the statute limits *annual* increases to the most recent 12 months of CPI.

In other words, the plain language of Section 3622(d) appears to limit not only the amount by which the Postal Service may raise market-dominant rates based on CPI looking back, but also the cumulative amount by which the Postal Service is able to raise rates over any 12-month period.[4] This reading is

[4] There would be an exception for rate increases using banked authority, which the statute provides for specifically.

supported by the policy of transparency embodied in the statutory requirement that the Postal Service file and maintain a schedule of regular and predictable rate requirements. The 12-month limitation, coupled with the requirement of a regular and predictable rate schedule, prevents the Postal Service from imposing maximum cumulative rate increases within a comparatively short period of time, where each increase is based on different CPI periods that cumulatively stretch back over more than a year.

Thus, Section 3622(d) caps market-dominant rate increases in two ways:

(1) A limit on the amount of increase capped at CPI, as measured over the preceding 12 months; and

(2) An annual limitation on rate increases, based on the 12 months preceding the filing. This would mean that cumulatively rate increases over any 12-month period cannot exceed inflation over that same period.

NPPC is unaware that this timing issue has been addressed in any previous rate case. It arises now because the Postal Service, in this docket, has sought to raise rates by the maximum amount so closely on the heels of the January increase, rather than according to the schedule of regular and predictable rate increases required by Section 3622(d)(1)(B). No other market-dominant rate increase has been filed so quickly after the preceding increase.

The statutory limit on the Postal Service's ability to raise rates so quickly does not frustrate its pricing flexibility. Nothing in Section 3622 requires the Postal Service to take the full CPI in one bite. Nor does anything in the law prevent the Service from filing smaller rate increases throughout the year so long as it continued to meet the annual limitation. Indeed, the law's grant of additional pricing flexibility to the Postal Service is entirely consistent with this view.

What the annual limitation *does* restrict is the Postal Service's ability to pile maximum rate increases—based on well more than one year of CPI—on top of one another in a short time. Accordingly, the Commission must reject the proposed rates insofar as they are based on CPI authority of 1.244 percent. NPPC recommends that the Commission direct the Postal Service to refile amended rates that are consistent with the annual limitation in Section 3622.

II. THE POSTAL SERVICE'S DISREGARD FOR THE SCHEDULE FOR REGULAR AND PREDICTABLE RATE CHANGES IS HIGHLY DISRUPTIVE TO COMMERCIAL MAILERS AND VIOLATES PROVISION IN RULE 3030.102

The Postal Service's filing is not contemplated in its most recently filed schedule of regular and predictable rate changes. Put simply, the Postal Service is imposing the largest increase on First-Class mailers since the enactment of the PAEA with absolutely no warning or transparency, other than the lead time contained in the Notice itself.

Rule 3030.102 requires, *inter alia*, the Postal Service to:

(1) Schedule rate adjustments at specific regular intervals of time;

(2) Provide estimated filing and implementation dates (month and year) for future rate adjustments for each class of mail expected over a minimum of the next 3 years; and

(3) Provide an explanation that will allow mailers to predict with reasonable accuracy, by class, the amounts of future scheduled rate adjustments.

The Postal Service's *Notice* violates every one of these provisions. The current filing appears does not appear on the current (or any past) schedule of "specific regular intervals of time." Neither the May 28 filing date nor the August 29 implementation date appears on any estimate of filing or implementation dates. And absolutely nothing about the schedule that currently appears on the Commission's website provides any explanation or otherwise allows mailers to predict, with any reasonable accuracy, the amounts of future increases.

This is an unacceptable way for the Service to treat its highest volume and most profitable customers. Commercial First-Class mailers set budgets for the upcoming year during the preceding summer. For example, many large commercial mailers are currently in the midst of budgeting for 2022. Similarly, they set their budgets for 2021 in the summer of 2020.

Under the current schedule, commercial mailers were able to predict the approximate size of the January 2021 increase by estimating, in June, where CPI through September was likely to come out. But when they prepared their mailing budgets for 2021—which they did in the summer of 2020—they did not anticipate, nor did the schedule for regular and predictable rate changes provide any reason for them to anticipate, a second increase in August of this year when budgets were prepared.

Furthermore, mailers could not realistically accurately predict what was then only *proposed* density and retirement factors—indeed, the Commission did not adopt rules authorizing them until later in 2020 and the Postal Service did not submit actual numbers for those factors until late December 2020. Plus, the density factor was far larger than the Commission itself had expected in Order No. 5763. Consequently, mailers have not, nor could they have, budgeted for the increases now proposed in this case.

Large commercial mailers cannot update budgets to accommodate the Postal Service's demand for more money, whether justified or not, out of cycle. Their only recourse will be to reduce the volume of mailings they make. Marketing mail will be the first to shrink, and mailers will redouble efforts to convert customers to electronic alternatives that will affect First-Class Mail.

This is not a one-time problem. Now that the Commission has authorized two unpredictable (and unknowable until late December at the earliest) additional rate factors—each of which alone could exceed inflation--forecasting future rates has become quite difficult. The Commission itself grossly underestimated the current density factor less than two months before the Postal Service submitted its calculation. *See* Order No. 5763, App. A, Table A-1 (presenting density factors based on historical data generally ranging between 0.36 percent and 1.72 percent, with the exception of a Great Recession influenced 2.69 percent, compared to the actual 4.562 percent).

Nor, given the Postal Service's failure to update the schedule, can commercial mailers now budget for 2022 in an informed manner. The current schedule, which the Service has not changed, indicates yet another rate increase will be noticed in October 2021 to take effect in January 2022. If such an increase goes ahead, presumably it would be limited to CPI increases from May through September 2021. Such a rate increase, however, could not include any new density or retirement rate authorities, as those figures are not even submitted for Commission review until late December. Will the Postal Service seek to file another rate increase in May of 2022 using whatever additional, non-

CPI, rate authorities it may then have? The Postal Service is not informing mailers of its plans either through the statutorily-required schedule or even informally through industry groups. Thus, mailers have no transparency into what postage rates they may be asked to pay in 2022.

The dual uncertainties as to timing (new rates in January 2022? August 2022? Other dates?) and amount (the density and retirement factors are literally unknowable until late December at the earliest, and not confirmed until the first quarter of the new year has passed) means that it is well-nigh impossible to budget with any accuracy. And mailers cannot and do not increase budgets when the Postal Service raises rates at unpredicted times.

So what do mailers do instead? They reduce the number and size of mailings in order to stay at budget. If mailers reduce their mailings by the approximately same percentage as the rates increase, the Postal Service may collect about the same amount of money, but it will do so with fewer pieces.[5] That reduction in pieces will put additional pressure on the density factor, which by design will likely cause those pieces that remain to shoulder an even greater burden of the system's costs. Regrettably, we will see a test soon of whether the

[5] For large mailers, as typically belong to NPPC, planned mailings can't turn on a dime. Those already planned will likely go ahead, notwithstanding the increases. However, mailers are beginning to plan, even now, to reduce mailings next year and beyond to mitigate the impact of these major increases, not to mention deal with the new volatility and unpredictability of the rates. What will likely be seen is a lagging effect on their mailings, such as was seen in 2017 in reaction to the exigency surcharge.

density (especially) and retirement factors will suppress volume in an escalating manner, as we warned in comments in Docket No. RM2017-3.[6]

Going forward, mailers will likely continue to reduce their exposure to what have now become highly unpredictable rate increases by reducing their future mailings and, in the longer run, reducing their investments in mailing technology.

The Commission's rules do not provide a specific remedy when the Postal Service files rates at a different time than stated in its most recent Schedule for Regular and Predictable rate increases, which is published on the Commission's website in what can now be seen as a completely ineffective effort to promote transparency. But the rate increases in the *Notice* are neither regular nor predictable. What purpose does the rule serve if the Postal Service is free to ignore it? The filing eviscerates the PAEA's promise of transparency. The Commission should enforce its rules by rejecting these rate increases.

III. THE POSTAL SERVICE'S FAILURE TO EXPLAIN HOW THE NEW RATES ARE IN ACCORDANCE WITH 39 U.S.C. §3622 REQUIRES THEIR REJECTION

A. The *Carlson* Ruling Requires The Postal Service To Address The Objectives And Factors, Notwithstanding Order No. 5763

In *Carlson v. Postal Regulatory Commission*, 938 F. 3d 337 (D.C. Cir. 2019), the Court of Appeals ruled that the Administrative Procedure Act requires the Commission, when administering the PAEA, to consider seriously and address arguments that particular proposed market-dominant rates are not

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[6] *See Comments of the National Postal Policy Council, the Major Mailers Association, the National Association of Presort Mailers, and the Association for mail Electronic Enhancement*, Docket No. RM2017-3, at 36 (Feb. 3, 2020).

consistent with the statutory considerations – quantitative and qualitative -- that Congress directed the ratesetting system to achieve. The Court found the statute unambiguously required consideration of the objectives and factors in a price cap prior review proceeding. 938 F.3d at 390. Despite the Commission's attempt to reinterpret the law creatively in Docket No. RM2017-3, the *Carlson* ruling remains governing law and cannot simply be ignored.

Accordingly, the Commission must consider the applicability of the statutory Objectives and Factors to specific rates, particularly those that commenters challenge. Here, the Postal Service has made no attempt to demonstrate how the rates satisfy the Objectives and Factors, and it is not the role of the Commission to supply that justification where the Postal Service has failed to do so. The Commission should reject the proposed rates and require the Postal Service provide the required justification.

B. Even Aside From *Carlson*, The Postal Service Has Failed To Comply With Commission Rule 3030.121(b)

Even if the Court of Appeals ruling in *Carlson* were inapplicable, Commission rule 3030.121 provides that the Postal Service "shall take into consideration how the planned rate adjustments are in accordance with the provisions of 39 U.S.C. chapter 36." There is no indication that the Postal Service has done so. Accordingly, the Commission should reject the *Notice* for noncompliance.

IV. THE RATES FOR FIRST-CLASS PRESORT MAIL DO NOT EVIDENCE A LONGTERM PRICING STRATEGY AND ARE NOT IN THE BEST INTERESTS OF THE POSTAL SERVICE

The proposed 6.8 percent increase in First-Class Mail rates amounts to more than $1.6 billion in the first year alone.[7] That is more than 57 percent of the increased revenue from market-dominant products overall. Although USPS Marketing Mail constitutes a majority of market dominant volumes, it would generate only slightly more than $900 million of the revenue (less than one-third) from the new rates. In other words, the Postal Service once again is targeting First-Class Mail with the biggest overall increase. Within First-Class Mail, it once again is targeting Presort Mail, the most profitable product, with the highest increase.

The Postal Service apparently believes that Presort Mail must be less responsive (that is, less price elastic) to price increases, because it states that Presort Mail volumes have declined less than Single Piece over the last few years. But that contradicts its own estimates of price elasticity filed this past January.[8] And the greater declines in Single-Piece in recent years is more readily explained by the relative price increases imposed on Single-Piece and Presort mail in recent rate cases.

Now that the Presort product will have received the highest rate increase in each of the last two cases, the Postal Service should expect to see its volume

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7 *See* USPS-LR-2021-2, CAPCALC-FCM-R2021-2, Tab Percent Change Summary.

8 *See USPS Econometric Demand Equation Tables for Market Dominant Products as of January 2021*, at 2, 6 (filed Jan. 2021) (showing Single-Piece Stamped Letters own-price elasticity of -0.131 and Workshared Letters own-price elasticity of -0.231).

declines accelerate, especially with the second above-average increase coming within nine months of the first. Why the Postal Service thinks it wise or prudent to accelerate the departure of its most profitable product through above-average rate increases is entirely unexplained. And when Presort volume and revenues are showing a healthy rebound from pandemic lows, why it would threaten to throttle that rebound also goes unexplained.

Coupled with the Service's determination to reduce service standards (Docket No. N2021-1) and through a self-serving belief that reliably slow delivery (assuming that it can be achieved) is preferable to generally faster but perhaps less consistent service, the Postal Service risks charging down a path towards irrelevance in the communications marketplace.

If the Postal Service has a coherent pricing strategy for First-Class Mail, it has yet to reveal it. At no point – neither in the *Notice*, in the Annual Compliance Review process, nor even at MTAC meetings – has the Postal Service articulated one. While the Postal Service routinely discusses, and the Commission accepts, how it must implement its pricing strategy over a multiyear period, that approach assumes that there is a clear and understandable policy. But the Postal Service neither asserts that one exists nor explains what it might be.

Such a policy would address how it takes considerations such as demand, price elasticity, diversion, and the desirability of retaining or increasing low-cost profitable mail into account in these rates. The *Notice* does none of this. And commercial First-Class mailers are perceiving that omission as indicative of the lack of a plan, or if there is an unstated plan, it appears to be to extract as much money as possible from an amount of Presort Mail remaining in the system diminishing in considerable part from the size of the very price increases applied.

V. THE POSTAL SERVICE'S WORKSHARE DISCOUNT PASSTHROUGHS FOR FIRST-CLASS PRESORT MAIL SHOW THE NEED FOR A STRONGER REGULATION

The proposed workshare discounts in First-Class Mail, while technically in compliance with the new passthrough requirements in rule 3030.280 *et seq* are therefore a step in the right direction. However, the passthroughs for Automation Letters, which while increased as required by the Commission's new rules, were set at the most inefficient level permitted under those rules, hovering close to the 85 percent minimum passthrough.

This problem has persisted for years. The Postal Service has consistently resisted repeated exhortations from the Commission to set First-Class Mail workshare discounts at more efficient levels. It was in recognition of the failure of the then-existing regulations to achieve efficient pricing of workshare discounts that led the Commission to adopt new rule 3030.280 *et seq*. However, subsection 3030.284(e) allows the Postal Service to set the discounts at no more than an 85 percent passthrough and contains no mechanism to force those passthroughs any closer to the 100 percent level needed to maximize efficiency. Nothing in the current filing suggest that the Postal Service has any intention of increasing those discount passthroughs in the future.

The Postal Service's consistent use of the smallest permissible passthroughs means that the Commission should respond by moving the minimum permissible passthroughs to 100 percent. Accordingly, NPPC submits that the Commission should promptly initiate a rulemaking to amend rule 3030.284(e) to require the Service to price workshare discounts at 100 percent passthroughs, and within much tighter bounds for exceptional circumstances.

VI. THE NEW NONAUTOMATION MACHINABLE AND NONMACHINABLE LETTERS RATE CATEGORIES SHOULD BE APPROVED

The *Notice* also announces a new rate structure for Nonautomation Machinable and Nonmachinable Letters. *Notice* at 8. The Commission should approve this new rate structure.

The new workshare discounts are Nonautomation-Machinable Mixed AADC; Nonautomation-Machinable AADC; Nonautomation Nonmachinable 3-Digit Letters; and Nonautomation Nonmachinable 5-Digit Letters. There is also a new rate category for Nonmachinable Letters Mixed ADC, which is not a workshare discount. *See* Response to ChIR No. 2, Q1.

NPPC does not know whether its members would make significant use of these new rate categories. However, restructuring rates to better match costs is generally desirable rate design.

One anomalous aspect of the new design is that the AADC Machinable Presort Letter and AADC Automation Letter rate are set to be the same: $0.461. This is unexplained. And there is no obvious reason why the two rates should be equal, as the AADC Automation letter, which bears a barcode, should cost less to process than the Machinable letter, which does not. Presumably the Postal Service will lower the AADC Automation rate in the future.

VII. CONCLUSION

For the foregoing reasons, the National Postal Policy Council respectfully urges the Commission to (1) reject the CPI portion of the proposed rates because they violate 39 U.S.C. §3622(d); (2) reject all of the new rates, as violative of Section 3622(b) and (c); (3) approve the new rate structure for Nonmachinable and Nonautomation machinable letters (which, in the absence of rates, would be a shell classification); and (4) commence a rulemaking proceeding to amend rule 3030.280 to require a full 100 percent passthrough of workshare avoided costs, plus or minus 5 percent, as essential to promote efficient pricing.

Respectfully submitted,

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